ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2019
CONSOLIDATED CASE NOS. 18-1150 & 18-1164

IN THE

United States Court of Appeals for the District of Columbia Circuit

TEMPLE UNIVERSITY HOSPITAL, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS,
Intervenor for Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT

FINAL REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Regulations

Constitutional Provisions

GLOSSARY OF ABBREVIATIONS

Acting Regional Director of Region 4 (RD)

Commonwealth of Pennsylvania (Commonwealth)

Final Rule, 54 Fed. Reg. 16,336 (1989) (codified at 29 C.F.R. § 103.30 (2018)) (Health Care Rule)

Health Care Institutions Amendments, Pub. L. No. 93-360 (1974) (codified as amended at 29 U.S.C. §§ 152, 158, 169, 183 (2018)) (Health Care Amendments)

Intervenor PASNAP's Brief (Union Br.)

National Labor Relations Act (NLRA or the Act)

National Labor Relations Board (NLRB or the Board)

National Labor Relations Board's Brief (NLRB Br.)

NLRB Case No. 04-RC-162716 (Representation Case)

NLRB's May 11, 2018 Decision and Order in NLRB Case No. 04-CA-174336 (Final Order)

NLRB's December 29, 2016 Order Granting Review in Part and Invitation to File Briefs (RFR Order)

NLRB's December 12, 2017 Decision on Review and Order (DRO)

PASNAP's Representation Petition in NLRB Case No. 04-RC-162716 (Petition)

Public Employe Relations Act (PERA)

Pennsylvania Labor Relations Board (PLRB)

RD's January 22, 2016 Decision and Direction of Election (DDE)

Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (the Union or PASNAP)

Temple Allied Professionals bargaining unit (TAP)

Temple University (TU)

Temple University Health System (TUHS)

Temple University Hospital, Inc. (TUH)

TU bargaining unit certified by the PLRB in 1975 (1975 Unit)

TUH's March 10, 2016 Request for Review of the DDE (RFR)

TUH's Opening Brief (TUH Br.)

SUMMARY OF ARGUMENT

1. Contrary to the arguments of the Respondent NLRB and the Intervenor Union, this Court should find that TUH's failure to bargain with the Union under the NLRA did not constitute an unfair labor practice or otherwise violate the Act. The Union's Petition in the underlying Representation Case, which resulted in the Board extending comity to the 665-employee TAP unit certified by the PLRB and conducting an election to add 11 employees to the unit, warrants dismissal on judicial estoppel grounds because the Union successfully argued to the PLRB in 2006 that the PLRB, not the NLRB, has jurisdiction over this unit.

Nor is the Union's offensive conduct limited to the 2006 petition, as the NLRB and Union briefs suggest. For more than a decade thereafter, the Union repeatedly invoked the jurisdiction of the PLRB in more than two dozen cases before seeking NLRB jurisdiction. Even as the Union pursued the Representation Case invoking the NLRB's jurisdiction—and indeed for almost a year after the Region issued its Decision and Direction of Election—the Union continued to a pursue an unfair labor practice case in front of the PLRB, affirmatively asserting that the PLRB had jurisdiction and, necessarily, that the NLRB did not since concurrent jurisdiction cannot exist. The Union's intent to manipulate the legal system in bad faith is apparent from its written admission that its motivation for

seeking the NLRB's jurisdiction is avoiding the Supreme Court's ruling that mandatory agency fees for public employees are unconstitutional. Thus, the Union's pursuit of the Petition which led to the NLRB's exercise of jurisdiction should be barred. The cases cited by the NLRB's brief about the limits of collateral estoppel are therefore inapposite. Moreover, the NLRB's arguments are not the basis on which the Board refused to apply judicial estoppel and, therefore, cannot be considered by this Court.

2. Contrary to the assertions in the NLRB and Union briefs, the Board's grant of comity to the TAP unit is contrary to law and the factual record. First, the Board's finding that the unit is not non-conforming under the Health Care Rule because it combines two of the eight permitted units is contradicted by the record and inconsistent with the Union's admission and the RD's finding of non-conformity. Thus, the NLRB's assertion to the contrary should be rejected out of hand. Similarly, the Board's alternative claim that TAP is an "existing non-conforming unit" under the Health Care Rule fails because substantial evidence, ignored by the Board, shows TAP is different than the 1975 Unit in terms of scope, employer, and bargaining representative.

Moreover, the NLRB cannot have it both ways, as it seeks to do. If TUH is an employer under the Act, as the NLRB asserts, the grant of comity is contrary to Board law and repugnant to the Act because the 2006 unit did not conform with the

Health Care Rule when certified, and in violation of *Summer's Living Systems, Inc.*, 332 N.L.R.B. 275 (2000), as the PLRB would have lacked jurisdiction at the time of the certification if it lacks jurisdiction now. The NLRB's assertions to the contrary are unavailing.

3. The claim by the NLRB and the Union that TUH is not a political subdivision under Section 2(2) ignores the substantial evidence on the record as a whole, which establishes that TUH's relationship with TU makes it an exempt political subdivision. Most notably, they ignore the substantial evidence of control by TU over TUH and, without basis, assert that the relationship between TU and TUH is the same as the relationship between the University of Pittsburgh and Children's Hospital of Pittsburgh.

4. The record shows that extending NLRB jurisdiction to this unit is unfair and will substantially prejudice TUH. With no explanation of how it effectuates the policies of the Act, the Board arbitrarily treats TUH differently than TU despite the close relationship between the entities. The Board ignores the labor protections under state law that have allowed TUH's bargaining relationships with employees to thrive over many years. The NLRB's conclusory assertion that NLRB jurisdiction will not be disruptive fails to acknowledge that functionally interwoven employees from TUH, TUHS and TU will no longer work side-by-side

under one set of labor laws, but will now be subject to two different legal frameworks, which is an inherently disruptive situation compared to the status quo.

Like the Board in the Representation Case, the NLRB and the Union fail to acknowledge that TUH was willing to add the petitioned-for employees to the existing TAP unit using PLRB procedures, thereby making NLRB jurisdiction unnecessary to protect the interests of the employees or the Union. Additionally, contrary to the claim in the NLRB's brief, the Board should have considered the Union's bad faith motive in filing the Petition for the sole and admitted purpose of violating its members' First Amendment rights in deciding whether to exercise its discretionary jurisdiction.

ARGUMENT

I. JUDICIAL ESTOPPEL BARS THE UNION'S PETITION.

Contrary to arguments raised by the NLRB and the Union for the first time on appeal, the Union should have been barred from filing the underlying Petition by judicial estoppel based on its decades-long and continuing assertion to the PLRB that it, not the NLRB, had jurisdiction. Had the Union not brought the Petition, we would not be here today. However, the NLRB asks the Court to ignore both the facts of the Union's offensive conduct and that necessary reality. The issue before the Court is whether TUH violated the Act by refusing to bargain with this Union over a certification which arose out of the Union's Petition. Thus, the Union's conduct in invoking the NLRB's jurisdiction should not have been ignored by the Board, warranting reversal.

A. This Court Should Reject New Arguments Raised by the NLRB and Union on Appeal.

The Board affirmed the RD's conclusion in the Representation Case that the Union was not judicially estopped from bringing the Petition based on the RD's findings on three points: (1) processing the Petition will not confer an unfair advantage on the Union or impose an unfair detriment on TUH; (2) there is no evidence that the Union misled the PLRB; and (3) there is an inadequate basis to believe the PLRB would have reached a different result had the Union taken some contrary position before the PLRB. RFR Order at 2 n.2 [JA45].

In their briefs, the NLRB and the Union raise several new arguments in an attempt to justify the Board's refusal to apply judicial estoppel to the Union's Petition. In particular, they claim that judicial estoppel does not apply because: the NLRB is an administrative agency; the Union's inconsistent positions related to jurisdiction; the NLRB was not party to the 2006 PLRB proceedings; and the Union's inconsistent positions did not arise within different phases of the same case. NLRB Br. 40-41; Union Br. 10-13. The Court must disregard these arguments because the NLRB and Union cannot defend the Board's judicial estoppel decision on appeal by asserting post-hoc rationalizations that were not part of the Board's decision. *See Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962)). Furthermore, as discussed below, these new arguments fail on the merits.

1. Judicial Estoppel Applies to Agency Proceedings and Is Not Limited to Conduct Within Individual Cases.

The NLRB claims that the Board "noted [that] it is not clear whether the doctrine of judicial estoppel applies to it." NLRB Br. 40. The Board noted nothing of the kind, but rather introduced its analysis of the judicial estoppel argument by assuming arguendo that the doctrine of judicial estoppel applied to Board proceedings. *See* RFR Order at 2 n.2 [JA45]. Because the Board assumed judicial estoppel applied to its proceedings, this Court should do the same.

In fact, the Board's assumption that it could apply judicial estoppel principles here was well-founded and should not be disturbed by this Court on appeal. Agencies and other courts to consider the issue have found judicial estoppel applicable to parties who take conflicting positions in agency proceedings. *See, e.g.*, *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (assuming agencies could apply judicial estoppel doctrine); *Doe v. Dep't of Justice*, 123 M.S.P.R. 90, 94-96 (M.S.P.B. 2015); *Time Warner Cable, A Div. of Time Warner Entm't Co., L.P.*, 21 FCC Rcd. 9016, 9020 (2006). The *Konstantinidis v. Chen* decision cited by the NLRB further reinforces that judicial estoppel principles apply in the agency context. *See Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980). In *Konstantinidis*, this Court treated the Maryland Workmen's Compensation Commission as a "judicial body" for judicial estoppel purposes when analyzing whether the Commission had issued a decision in the plaintiff's favor. *See id.* at 938-39.

The *Konstantinidis* case also highlights that judicial estoppel is not limited to different phases of the same case, as the NLRB asserts in its brief. NLRB Br. 41. Indeed, the Supreme Court's seminal decision on judicial estoppel arose from inconsistent positions taken by New Hampshire in two cases that were twenty-five years apart. *See New Hampshire v. Maine*, 532 U.S. 742, 746 (2001) (describing New Hampshire's action against Maine regarding the inland boundary of the

Piscataqua River and the states' prior legal dispute about lobster fishing rights in the 1970's).

2. Contrary to the Misleading Assertions of the NLRB and the Union, TUH Does Not Seek to Apply Judicial Estoppel Against the NLRB.

The Board erred by failing to find judicial estoppel prevented ***the Union*** from bringing the Petition given the Union's inconsistent prior and contemporaneous representations to the PLRB. TUH does not suggest that judicial estoppel should be applied against the Board itself. *See Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60-61 (1984). Nor is TUH "seeking to prevent the NLRB from asserting its own jurisdiction based on the incorrect premise that once parties decide to petition a state labor board, the federal agency is forever foreclosed from asserting its jurisdiction over those employees." NLRB Br. 42. Rather, TUH relies on the well-established rule that a party—here the Union—should not benefit from making inconsistent assertions to judicial tribunals. Because judicial estoppel prevents the Union from taking inconsistent positions, it is irrelevant that the NLRB was not a party to earlier PLRB proceedings.

3. The Instant Case Does Not Raise Jurisdictional Concerns.

The Board and Union also assert for the first time that judicial estoppel does not apply to jurisdictional arguments. NLRB Br. 40; Union Br. 11-13. The two

cases cited by the NLRB in its brief are readily distinguishable. Both involve litigants attempting to use judicial estoppel to keep a case before a federal court when the court may otherwise have lacked subject matter jurisdiction. *See Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227-28 (10th Cir. 2011) (despite plaintiff's success in a prior ERISA lawsuit, judicial estoppel did not prevent plaintiff from challenging existence of ERISA standing when his employer sought to remove plaintiff's subsequent state law action to federal court on ERISA preemption grounds); *Gray v. City of Valley Park, Mo.*, 567 F.3d 976, 981-82 (8th Cir. 2009) (analyzing plaintiffs' Article III standing rather than relying on judicial estoppel where plaintiffs asserted on appeal that they never had standing to bring their claims). The outcome of these cases is unsurprising. Subject matter jurisdiction goes to the heart of a federal court's authority over a claim and cannot be waived, which is why federal courts retain inherent power to dismiss actions *sua sponte* for lacking subject matter jurisdiction.

Nevertheless, a court can rely on judicial estoppel to decline jurisdiction when its exercise of jurisdiction is discretionary. *See Vincent v. Money Store*, No. 01-cv-5694, 2014 WL 1087928, at *2-3 (S.D.N.Y. Mar. 19, 2014). In *Vincent v. Money Store*, the plaintiffs sought to reassert state law claims they had previously abandoned and argued that judicial estoppel could not deprive the court of

jurisdiction. *Id.* at *2-3. The court rejected the request, noting:

> [T]he Court plainly has jurisdiction to decide whether to exercise supplemental jurisdiction over the state law claims. The Court chooses not to exercise supplemental jurisdiction based on, among other grounds, judicial estoppel.

Id. at *3. *See also Mathison v. Berkebile*, 988 F. Supp. 2d 1091, 1102 (D.S.D. 2013) (judicial estoppel barred warden respondent from challenging personal jurisdiction).

Here, TUH is not seeking to use judicial estoppel to establish NLRB jurisdiction or expand its authority. Nor is this a situation in which the Union has a statutory right to Board jurisdiction since the Board has discretion to decline jurisdiction. Accordingly, the instant case is not a jurisdictional dispute for which judicial estoppel may be inappropriate.

B. The Board's Findings Misapply the Law and Facts.

The Board's stated reasons for concluding the Union was not judicially estopped from bringing the Petition are not supported by the record as a whole and reveal the Board's misunderstanding of the applicable legal doctrine.

The Supreme Court describes three common factors of judicial estoppel: (1) the party took the opposite position in prior proceedings; (2) the party was successful in persuading that tribunal of its position; and (3) the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire*, 532 U.S. at 749-51. There is no dispute that the

Union's conduct meets the first element. During its bid to oust the incumbent union 1199C as bargaining unit representative in 2006, the Union claimed the PLRB had jurisdiction over TUH. The Union now claims TUH is subject to NLRB jurisdiction despite no change in the underlying facts or relevant law.

The RD's finding that the PLRB accepted the Union's position in 2006 should be sufficient to satisfy the second element of judicial estoppel. However, the Board applied a more exacting legal standard, requiring evidence that the PLRB would have reached a different result if the Union had taken a contrary position or evidence that the Union misled the PLRB. Judicial estoppel does not require TUH to show that the PLRB would have reached a different conclusion if the Union had taken a different position. It should not be asked to prove a negative.

Here, however, the PLRB was necessarily reliant on the Union's assertion that the PLRB had jurisdiction since the Union, as the petitioning party, could have withdrawn its petition at any time and filed with the NLRB instead. If, as the Board argues, TUH is not a political subdivision, then the PLRB was only able to order an election in the 2006 case because the Union asserted the PLRB had jurisdiction and chose to pursue its petition in front of the state labor agency. In addition, the PLRB clearly relied on the Union's viewpoint in reaching a decision because the hearing examiner asked the parties to submit briefs addressing the

jurisdiction issue and referenced them in the decision finding PLRB jurisdiction in the face of 1199C's argument to the contrary. *Temple Univ. Health Sys.*, Case No. PERA-R-05-498-E, 39 PPER ¶ 49, 2006 PA PED LEXIS 69, at *10 (PLRB Order Directing Submission of Eligibility List, April 21, 2006).

There is also ample evidence that the Union has sought to manipulate the administrative and judicial systems for its own advantage. The NLRB and Union ignore Union actions after the 2006 PLRB case. After winning the election in 2006, the Union continued to assert the PLRB had jurisdiction over the parties by filing cases with the PLRB. Indeed, the Union was pursuing a case before the PLRB ***at the same time*** it filed and litigated the Petition in front of the NLRB. *See PASNAP v. Temple Univ. Health Sys.*, PERA-C-14-259-E, 48 PPER ¶ 54, 2016 PA PED LEXIS 84 (PLRB Proposed Decision & Order, Nov. 30, 2016). In doing so, the Union asserted to the PLRB that it, not the NLRB, had jurisdiction, because there cannot be concurrent jurisdiction, as the NLRB concedes. *See* 43 P.S. § 1101.301(1) (excluding employers covered by the NLRA from the definition of "public employer"); NLRB Br. 32 (supremacy of NLRB jurisdiction). The Union's actions, which continued for nearly a year after the DDE issued, clearly evince an intent by the Union to mislead and manipulate at least one of the tribunals. Moreover, shortly before filing the Petition, the Union admitted to TUH in writing that its motivation for filing the Petition was to circumvent an

anticipated ruling by the Supreme Court striking mandatory agency fees by public employers for being unconstitutional under the First Amendment.

Under these circumstances, allowing the Union to invoke NLRB jurisdiction would give the Union an unfair advantage from gaming the legal system. The NLRB suggests that differences TUH identified between the federal and state labor regimes—i.e., the NLRA's requirement that employees in acute care hospitals provide a 10-day strike notice and private employers' ability to implement terms at impasse—would benefit TUH. NLRB Br. 44. Thus, according to the Board, NLRB jurisdiction poses no detriment. The Board ignores other distinctions, including the NLRA's narrower definition of management rights not subject to bargaining and a myriad of differences in legal standards and processes between the NLRB and the PLRB. Moreover, it is not for the NLRB to decide which legal scheme is more beneficial to TUH by cherry-picking a few of the many differences, and it fails to appreciate that the Board's assertion of jurisdiction upsets provisions which have been negotiated over more than two decades with this Union and others.

In addition, the NLRB brief ignores that the Union has enjoyed the benefit of these differences for years. TUH had to bargain a 10-day strike notice into the CBA, meaning that it had to give something to the Union for that concession. When the parties reached impasse during collective bargaining negotiations in

2009, TUH made a last best offer to the Union. JA95 at 142. Yet, for months, TUH was unable to impose contract terms on the Union under PERA. JA95 at 142-44. If the parties had been under NLRB jurisdiction, TUH would have been entitled to impose its last best offer and a 30-day strike might have been avoided. *See id.* As discussed in Part II below, the Union may not have even been certified to represent the TAP unit because it violates the Health Care Rule. *See* 29 C.F.R. § 103.30(a). Having reaped the benefits of its repeated invocation of state jurisdiction, judicial estoppel bars the Union from taking a directly contrary legal and factual position merely because the Union now believes it would be more advantageous.[1]

Finally, the NLRB and the Union argue that judicial estoppel is inapplicable because TUH, like the Union, also advocated in favor of PLRB jurisdiction in 2006. The Supreme Court rejected a similar argument in *New Hampshire v. Maine*, 532 U.S. 742 (2001). In that case, the Supreme Court held that judicial estoppel prevented New Hampshire from changing its position regarding the meaning of "Middle of the River," a key phrase for determining the proper marine boundaries between New Hampshire and Maine. The states had previously

[1] Nor is there merit to the Union's claim that judicial estoppel does not apply because this is a legal change rather than a factual one. The Union's claims to the PLRB were both factual and legal when it alleged in every case that TUH was a public employer. *See* JA155-57, ¶¶ 9, 11-12.

reached an agreement about the phrase's meaning and obtained a consent decree during a legal dispute twenty-five years earlier. *Id.* at 746-47. When New Hampshire sought to interpret the term differently in 2001 to expand its boundary closer to Maine's shoreline, the Court used judicial estoppel to prevent New Hampshire from making that argument. *See id.* at 749. Notably, the Court believed the doctrine was applicable to New Hampshire even though Maine had advocated for the same interpretation of "Middle of the River" as New Hampshire in the earlier litigation, had jointly moved the Court for a consent judgment, and had represented to the Court that the proposed judgment was in the best interest of each state. *See id.* at 751-52. Accordingly, it is irrelevant to this Court's judicial estoppel analysis that TUH also advocated for PLRB jurisdiction in 2006.

II. EXTENDING COMITY TO THE TAP UNIT VIOLATES THE HEALTH CARE RULE AND BOARD PRECEDENT.

The Board may grant comity to state certifications that were issued prior to the Board's Health Care Amendments, which extended coverage to private, non-profit hospitals in 1974 (e.g., existing non-conforming units), and/or certifications that were valid at the time of their issuance. *See, e.g., Summer's Living Sys., Inc.*, 332 N.L.R.B. 275 (2000) (declining to extend comity to state elections that occurred during time the Board had jurisdiction). Because neither of those criteria exists here, the Board's extension of comity to the TAP unit certified by the PLRB

in 2006 is unsupported by substantial evidence and arbitrarily departs from Board precedent.

The Board's brief correctly notes that the NLRB typically only extends comity to state labor board certifications if the state proceedings comported with due process, were free of election irregularities and reflect the "true desires" of employees. NLRB Br. 32-33 (citing *Doctors Osteopathic Hosp.*, 242 N.L.R.B. 447, 448 (1979)). TUH does not object to extending comity to the PLRB's 2006 certification of the TAP unit on those grounds. However, extending comity to a state certification of a bargaining unit certified in an acute care hospital on or after May 22, 1989 implicates the unit's compliance with the Health Care Rule. Comity is also inappropriate where the state labor board lacked jurisdiction when it issued the certification. Both of these issues are present with respect to the 2006 TAP unit. *See* TUH Br. 33-39.

A. The TAP Unit Violates the Health Care Rule.

The Health Care Rule sets eight types of appropriate units in acute care hospitals and allows "various combinations" of the units to be appropriate. 29 C.F.R. § 103.30(a). All other units in an acute care hospital are considered "non-conforming." *See* § 103.30(f)(5). However, the Health Care Rule does permit "existing non-conforming units." § 103.30(a).

The 2006 TAP unit to which the Board granted comity is a non-conforming unit that violated the Health Care Rule. The Board's brief claims that the NLRB found that the unit was appropriate because it combined two of the specified units: professional and technical employees. NLRB Br. 34. However, the Board's actual finding was that the TAP unit was "a combined unit of ***all*** professional and technical employees." DRO at 4 [JA49] (emphasis added); *see also* § 103.30(a)(3),(4).[2]

The Board's factual finding that the TAP unit is not non-conforming lacks record support. First, the parties did not litigate this issue during the pre-election hearing because the Union admitted early on in the proceedings that the TAP unit was non-conforming. JA65 at 24. The RD also characterized it as non-conforming in the DDE, stating: "Petitioner seeks to add these two classifications to the existing non-conforming unit." DDE at 16 [JA28]. The Board reached the opposite conclusion when rendering a decision on the RFR, but there is no factual

[2] To qualify for the Health Care Rule's exception for combined units, a unit must be a combination of entire units, not subsets of employees within specified units. *See, e.g.*, *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012) (union properly sought a combined unit of all employees within six of the eight categories). If a combined unit could be formed around subsets of employees within the listed units this exception would swallow the rule and no unit would meet the definition of "non-conforming." *See* § 103.30(f)(5) ("A non-conforming unit is defined as a unit other than those described in paragraphs (a) (1) through (8) of this section or a combination among those eight units.").

information in the record to support a conclusion that the TAP unit included all professional and all technical employees.

The Board's alternative finding that the unit qualifies as an "existing non-conforming unit"—i.e., that it existed prior to May 22, 1989—also fails. Extending comity to the TAP unit certified by the PLRB in 2006 does not mean that the Board may rely on an earlier unit certified by the PLRB in 1975 when TUH did not exist separately from TU. *See* DRO at 4 [JA49] (claiming the 2006 PLRB certification is "for a bargaining unit that was originally certified in 1975 (albeit with a different collective-bargaining representative)"). The Board erroneously states that the 2006 certification covers the same unit the PLRB certified in 1975. The record reflects that the 2006 TAP unit differs from the 1975 Unit in every material way: identity of collective bargaining representative, identity of employer, and overall unit scope. *See* TUH Br. 34-35.

The NLRB argues that a subset of a previously recognized bargaining unit is entitled to the presumption of appropriateness. NLRB Br. 36-37 (citing *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1085 (D.C. Cir. 2003)). However, the case it cites did not involve a non-conforming unit under the Health Care Rule because the "subset" at issue was all nurses at an acute care hospital that had previously been part of a larger multi-facility unit before the hospital was sold. *See Cmty. Hosps.*, 335 F.3d at 1085-86; *see also Presbyterian Univ. Hosp. v. NLRB*, 88

F.3d 1300, 1307-08 (3d Cir. 1996) (Health Care Rule leaves NLRB authority to determine whether a single or multi-facility unit is appropriate).

Here, the Board opted to extend comity to the 2006 TAP unit which came into being well after the Board adopted the Health Care Rule in 1989, which is repugnant to the Act and would encourage forum shopping.

B. The Board Unreasonably Departed from Precedent By Extending Comity to the TAP Unit.

If the Board and Union are correct that TUH is an employer under the NLRA, the PLRB lacked jurisdiction over TUH in 2006 because the salient facts about TUH have not changed. As a result, the Board could not extend comity to the 2006 certification because the certification would be void at the time of issuance. *Summer's Living Sys., Inc.*, 332 N.L.R.B. 275, 277 (2000). *Summer's Living Systems* directs that comity should not be granted to state labor board certifications when the state lacked jurisdiction at the time the election/certification occurred. *Id.* Although the Board attempts to rely on earlier Board cases in which the validity of state jurisdiction was irrelevant to comity determinations, it is unable to meaningfully distinguish the more recent *Summer's Living Systems* decision from TUH's case.

The differences cited by the Board are immaterial and have shifted over time. The Board's brief asserts only one of the original distinctions identified by the Board in the DRO: that *Summer's Living Systems*, unlike the present case,

involved an intervening state court decision clarifying that the state lacked jurisdiction. DRO at 4-5 n.7 [JA49-50]; NLRB Br. 38. Both NLRB jurisdiction over a covered employer and federal preemption are legal realities that exist regardless of whether a state court recognizes them. Not surprisingly, the Board does not explain why the existence of a state court ruling acknowledging preemption would impact the Board's behavior as compared to an identical situation in which a state court had not issued such a ruling, since there can be no rational explanation. Surely, the Board is not suggesting that its jurisdiction depends on a state's acknowledgment of the Board's jurisdiction in a particular case. Accordingly, the Board cannot use this distinction to justify applying a different standard in the present case than in *Summer's Living Systems*.

The NLRB also claims in its brief that the *Summer's Living Systems* employers never consented to the elections or bargained with the union whereas TUH and the Union agreed to the PLRB election, stipulated to its jurisdiction, and bargained for more than a decade. NLRB Br. 38. However, this Court cannot uphold the Board's Final Order on this basis because the Board did not provide these reasons in the underlying decision. *See NLRB v. v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460, 465 (D.C. Cir. 2016); *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012). The same is true of the Union's new argument that TUH ratified the results of the PLRB election and certification by

recognizing its validity and embarking on negotiations with the Union, such that TUH cannot now claim that the unit is inappropriate. Union Br. 9-10. As an initial matter, it is unclear why TUH's acceptance of the PLRB certification under state law would preclude TUH from later challenging the legality of the unit under federal law, especially when the Union has sought to invoke NLRB jurisdiction over the unit. More importantly, this argument is another post-hoc rationalization that did not feature in the Board's underlying decision and which therefore cannot form a basis for this Court to affirm the Board's Final Order. *Erie Brush*, 700 F.3d at 23.

III. TUH IS AN EXEMPT POLITICAL SUBDIVISION.

Under the NLRA, an employer does not include "any State or political subdivision thereof." 29 U.S.C. §152(2). Entities are political subdivisions if they are either: (1) created directly by the state, so as to constitute departments or administrative arms of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Nat. Gas Util. Dist. of Hawkins Cnty.*, 402 U.S. 600, 604-05 (1971). The Board may also consider certain secondary factors that support or detract from political subdivision status. *See, e.g.*, *id.* at 606-07. Other factors relied on by the Board include: government control over employees and daily operations; government control over labor relations, employee benefits and human resources; policies that are consistent

with those of public employees; the use of government-owned facilities and equipment; the degree of government oversight over budget and finances; and administrative services provided by the government. *Northern Diagnostic Services, Inc.*, G. C. Advice Memo., Case No. 18-CA-60338, 2011 WL 6960025, *4 (2011) (citing cases). The term "government" in this context includes political subdivisions. *See id.* at *5.

The Board and Union argue in their briefs that TU, one of the Commonwealth of Pennsylvania's four "state-related universities," is not a political subdivision under the Act. The Board has declined to exercise jurisdiction over TU since 1972 based on its "unique relationship" with the Commonwealth. *See Temple Univ.*, 194 N.L.R.B. 1160, 1161 (1972); *see also* TUH Br. at Section I.A (Statement of Case). TU has never been a party in this case, and its legal status has not been litigated in these proceedings. Nevertheless, this Court should treat TU as a political subdivision (or the equivalent of a political subdivision) because that is how the NLRB viewed TU for the purposes of its own analysis below.[3]

By virtue of its relationship with TU, TUH (considered interchangeable with TUHS for labor relations purposes), is a political subdivision under *Hawkins* and

[3] In the DRO, the Board noted that it has never held TU to be an exempt political subdivision, but assumed that TU "could be analogized to an exempt political subdivision" when analyzing whether the Board should decline to exercise jurisdiction. DRO at 2 [JA47].

Northern Diagnostic.[4] The RD's holding that TUH is not a political subdivision, which the Board affirmed, is contrary to the law and the record and should be overturned. The assertions of the NLRB and the Union in their briefs ignore the extensive control and interrelationship between TU and TUH, focusing solely on the lack of political apppointees to TUH's board and the asserted lack of control by TU of operations at TUH. That myopic vision is flawed and a distortion of the record and should be rejected in light of the extensive record summarized in TUH's brief. Notably, TU is the sole member of TUHS, which is the sole member of TUH. JA1283; JA1365. Stated differently, TUH is the wholly-owned subsidiary of a political subdivision's wholly-owned subsidiary. TU, TUHS, and TUH have interlocking boards with leadership of TU, including its president and the chair of its board, serving on the boards of TUHS and TU. JA1292; JA82 at 90-92. The TU board of trustees is the sole entity with power to appoint and remove directors of TUHS. JA1284-86. TUHS has the authority to appoint and remove the TUH board of directors. JA83 at 93-94; JA1367-68. This corporate structure and degree of board control is very similar to *Northern Diagnostic*, in which the private subsidiary (Northern Diagnostic) of a subsidiary (Medical

[4] The parties stipulated in the Representation Case that TUHS and TUH are interchangeable for purposes of collective bargaining. JA1175, ¶ 23. Therefore, references to TUHS and TUH should be viewed as pertaining to the same entity for purposes of determining whether TUHS/TUH—the entity that controls the labor relations functions of the petitioned-for employees—is a political subdivision.

Center) of a political subdivision (the Commission) qualified as a political subdivision under the second prong of *Hawkins* based on the corporate relationship between the three entities.

As discussed in more detail in TUH's Opening Brief, TUH and its relationship to TUHS and TU satisfy many factors relevant to a political subdivision analysis under *Hawkins* and *Northern Diagnostic*, including: overlap of personnel; use of government- and political subdivision-owned facilities; government reporting; shared services and infrastructure with a political subdivision; financial reporting; interrelationship regarding determination of wages and benefits; insurance coverage; and issuance of tax-exempt bonds.[5] *See* TUH Br. 45-53. Moreover, contrary to the claim by the NLRB and the Union that TU does not control operations or labor relations at TU, the record establishes that the leadership of TUHS which exercises direct control over the operations and approves the labor strategy, are all employees of TU. *See, e.g.*, JA78 at 74; JA82 at 92; JA84 at 98; JA85-86 at 103-05; JA1171, ¶¶ 13, 14; JA1174-75, ¶¶ 20, 21. Thus, the assertion that TU does not control TUHS is contrary to the record. TUH is not an employer under Section 2(2) of the Act. The Board's affirmance of the

[5] For example, both TU and TUH are exempt from state tax under the Purely Public Charities Act, 10 P.S. § 374. JA222, ¶ 21.

RD's findings to the contrary are against the substantial evidence on the record as a whole and warrant reversal.

Moreover, the claim by the NLRB and the Union that the relationship between TU and TUH is analogous to the relationship between the University of Pittsburgh and the Children's Hospital of Pittsburgh is wholly unsupported and should be rejected out-of-hand. Nothing in the record establishes the relationship between those two entities and, thus, the Court should give no weight to the fact that the NLRB exercises jurisdiction over the Children's Hospital of Pittsburgh. In addition, it was not relied on by the Board below and cannot be raised here.

Finally, the Court should reject the Union's invitation to accord any weight to a finding by the Office of Labor Management Standards of United States Department of Labor that TUH is subject to federal jurisdiction. TUH was not a party to that proceeding and does not know what, if any, evidence or arguments were presented to the DOL which led to that determination. Moreover, it would violate TUH's due process rights to have the government seek to use against it the results of a proceeding of which it did not have notice or an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976). Nor was this determination relied on by the Board in its findings, rendering it outside the Court's purview on its review of the Board's decision. *Erie Brush*, 700 F.3d at 23.

IV. THE BOARD ACTED ARBITRARILY AND SUBSTANTIALLY PREJUDICED TUH IN REFUSING TO DECLINE JURISDICTION.

The Board may decline jurisdiction where jurisdiction would not effectuate the policies of the Act, and it should decline jurisdiction over TUH here. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684 (1951). As discussed in Part II, asserting jurisdiction over TUH will result in substantial prejudice to TUH. *See Human Dev. Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991).

It is clear from the record that asserting jurisdiction in this case is also arbitrary and unfair. *See id.* TUH already has a highly unionized workforce whose bargaining rights are protected under Pennsylvania labor law. The NLRB has not explained how extending jurisdiction over TUH will effectuate the policies of the Act given the existence of these long-term union relationships that have been governed by state labor law for decades. The NLRB continues to insist in its brief that this bedrock change will not be disruptive because the bargaining relationships are between the unions and the TUH, not with the PLRB. However, that argument ignores how functionally intertwined TU, TUHS, and TUH are with one another and that the Board's decision will take them from a single unified labor framework to one in which two labor laws apply. Having TU employees working under PERA rules side-by-side with TUH employees working under NLRA rules is unnecessarily disruptive.

In addition, the Board failed to recognize a key fact raised by then-Chairman Miscimarra's dissent: TUH consistently offered to add the petitioned-for employees to TAP under the PLRB's procedures. Given the PLRB procedures that were readily available for the Union to add these classifications to TAP, and the extensive protections offered to covered employees by PERA, the Board's extension of jurisdiction in this case was arbitrary and served no purpose under the Act.

Finally, the Board ignored that the sole and admitted purpose of the Petition was to violate the First Amendment rights of covered employees by circumventing the then-anticipated Supreme Court decision on compulsory union fees. The cases cited by the NLRB in its brief to support the assertion that a petitioner's evil motive cannot deprive the Board of jurisdiction are cases with wholly different facts. *See NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 18 (1943); *IBEW Local 1316 (Superior Contractors)*, 271 N.L.R.B. 338, 341 (1984). Yet these cases support the idea that the Board can take bad faith or evil motive into account in deciding how to exercise its discretion. *See Indiana & Michigan Elec. Co.*, 318 U.S. at 18 ("While we hold that misconduct of the union would not deprive the Board of jurisdiction, this does not mean that the Board may not properly consider such misconduct as material to its own decision to entertain and proceed upon the

charge."). The Board should have considered the Union's motivation in deciding whether to decline jurisdiction over TUH.

Accordingly, the Board's exercise of jurisdiction was arbitrary and should be reversed.

CONCLUSION

For the foregoing reasons, and those set forth in TUH's opening brief, this Court should grant TUH's petition for review, deny the Board's cross-application for enforcement of the Final Order, and vacate the Board's Final Order.

Dated: January 9, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,487 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), as counted by Microsoft Word 2010.

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced, 14-point, Times New Roman typeface using a Microsoft Word 2010 word processing program.

Respectfully submitted,

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Dated: January 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2019, I electronically filed the foregoing document with the Clerk of the Court for the District of Columbia Circuit by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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